

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

FIRST, LLC, a Delaware Limited Liability Company,	X	
	:	Civil Action No.
Plaintiff,	:	05-10544-JLT
	:	
v.	:	AFFIDAVIT OF
	:	IRWIN B. SCHWARTZ
TIMOTHY MCARTHUR,	:	IN SUPPORT OF
	:	PROPOSED STIPULATED
Defendant.	:	TEMPORARY
	:	<u>RESTRAINING ORDER</u>
	X	

Irwin B. Schwartz hereby respectfully requests that the Court enter the proposed stipulated temporary restraining order submitted herewith for the reasons set forth below and deposes and states:

1. I am an attorney duly admitted in the Commonwealth of Massachusetts and this Court and a member of the law firm Petrie Schwartz LLP. My firm is counsel to plaintiff FIRST, LLC ("FIRST") in this action.

2. On or about Tuesday, March 22, 2005, FIRST commenced this action by filing a verified complaint and an application for temporary restraining order, expedited discovery and document preservation order.

3. On the morning of Thursday, March 24, 2005, I heard from Chambers that I should inform defendant that, upon his retention of local counsel, the Court would schedule a hearing on the application for temporary restraining order.

4. Three times on March 24, 2005 (twice by email and once by Federal Express letter) I wrote to Mr. McArthur to inform him of the Court's instruction and ask who would represent him in this action.

5. On the morning of Friday, March 25, 2005, Mr. McArthur called me and

informed me that he had not yet retained counsel and indicated that he did not wish to do so. He also asked if there was a way that he could avoid having to appear for a temporary restraining order hearing. We also discussed possible settlement of this dispute.

6. As part of those discussions, I suggested that he stipulate to the entry of a temporary restraining order in order to protect FIRST while settlement discussions progressed. He agreed to the concept in principle and asked that I draft a proposed stipulated temporary restraining order, which I did and emailed to him in the early afternoon on March 25, 2005.

7. Later in the afternoon on March 25, 2005, Mr. McArthur called me and informed me that he wanted to have an attorney review the draft proposed temporary restraining order that I had sent him earlier. I suggested that Mr. McArthur do so and provide any comments to me on Monday morning, March 28, 2005.

8. At the end of the day on March 25, 2005, I informed Chambers by e-mail of these developments.

9. On March 28, 2005 I received an email from Mr. McArthur indicating he had consulted with counsel and suggesting minor changes to the draft proposed stipulated temporary restraining order I had sent him on March 25, 2005. A copy of that email is attached hereto as Exhibit A (with private contact information redacted).

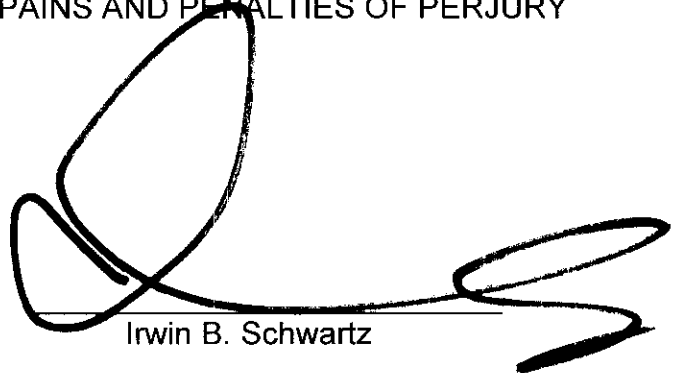
10. In response, I made the changes requested by Mr. McArthur to the draft proposed stipulated temporary restraining order and sent it to Mr. McArthur by email with a request that he send a signed copy back to me by facsimile.

11. At approximately 1:30 in the afternoon on March 28, 2005, I received by

facsimile a signed copy of the second draft proposed stipulated temporary restraining order, a copy of which is attached as Exhibit B.

12. At around the same time, I received an email from Mr. McArthur confirming he had signed and faxed the proposed stipulated temporary restraining order, a copy of which is attached as Exhibit C (with private contact information redacted).

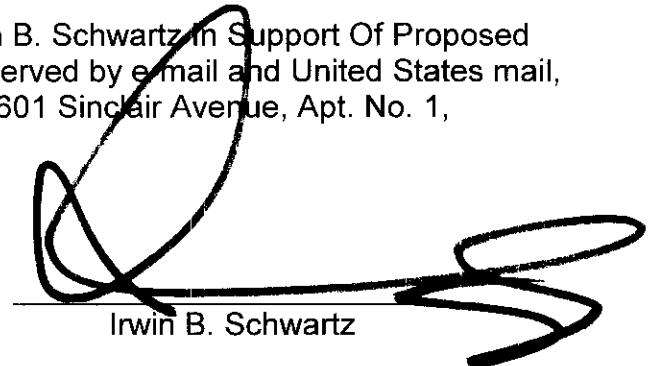
SWORN AND SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY  
THIS 28th DAY OF MARCH, 2005.



Irwin B. Schwartz

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit of Irwin B. Schwartz in Support Of Proposed Stipulated Temporary Restraining Order was served by e-mail and United States mail, postage prepaid, upon Timothy McArthur, at 2601 Sinclair Avenue, Apt. No. 1, Concord, California 94519.



Irwin B. Schwartz

**Irwin Schwartz**

**REDACTED**

**EXHIBIT A**

**From:** McArthur, Timothy  
**Sent:** Monday, March 28, 2005 12:26 PM  
**To:** Irwin Schwartz  
**Subject:** RE: Update On Proposed Stipulated TRO In FIRST, LLC v. McArthur

Mr. Irwin

I discussed the proposed stipulated TRO with the attorney that has been advising me. I expressed my concern about the phrasing in the TRO that is lacking the fact in which I "proposed and agreed" to the TRO. The attorney agreed and offered a suggestion of some minor changes in the wording;

"Upon verified complaint, the memorandum in support of ex parte application for TRO and expedited discovery, the affidavit of Irwin Schwart, and pursuant to agreement of First, LLC and Tim McArthur, the court orders..."

As I expect First to publish this document on their web-site, I would like it to be noted within that the TRO is something in which I have "agreed" to, not just "ordered" by First or the court.

If the above change is acceptable, I am prepared to accept and sign the Stipulated TRO so we can move forward in a full resolution with the other issues. Feel free to call me at my work if you would like to discuss this further.

Lastly, I have a question regard item #2 on the TRO. Would I be required to attend such hearing?

Tim McArthur

**REDACTED**

---

**From:** Irwin Schwartz [mailto:ischwartz@petrieschwartz.com]  
**Sent:** Friday, March 25, 2005 12:59 PM  
**To:** zita\_lovett **REDACTED**  
**Cc:** McArthur, Timothy  
**Subject:** Update On Proposed Stipulated TRO In FIRST, LLC v. McArthur

Zita:

Here is the latest on timing for the stipulated TRO: I have heard from Mr. McArthur that he will consult with counsel prior to signing the proposed stipulated TRO that I sent to him earlier this afternoon. I hope to present the court with a proposed stipulated order on Monday.

Thank you.

Irwin Schwartz  
Petrie | Schwartz LLP  
500 Boylston Street, Suite 1860  
Boston, MA 02116  
617.421.1800 (phone)  
617.421.1810 (fax)  
ischwartz@petrieschwartz.com

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3/28/2005

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3/28/2005

EXHIBIT B

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

FIRST, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

TIMOTHY MCARTHUR,

Defendant.

Civil Action No.

[PROPOSED] STIPULATED ORDER ON EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING ORDER

Upon the Verified Complaint, the Memorandum in Support of Ex Parte Application for Temporary Restraining Order and Expedited Discovery, the Affidavit of Irwin B. Schwartz, and pursuant to the agreement of FIRST, LLC and Timothy McArthur and for good cause shown, it is hereby ORDERED that:

1. A Temporary Restraining Order immediately shall issue, and the defendant, his officers, agents, servants, employees, attorneys, and those persons in active concert or participation with him, shall not publish NASCAR® Racing 2003 Season source code or any derivative thereof. Plaintiff may notify defendant and others potentially subject to the Temporary Restraining Order by electronic mail delivery of copies of this Order and the Temporary Restraining Order in PDF and TIFF file formats, followed by service by certified United States mail to such recipient's last known address.

2. The hearing on Plaintiff's Motion For Preliminary Injunction shall be held on April \_\_\_, 2005 at \_\_\_ o'clock.

Dated: March , 2005

SO ORDERED,

\_\_\_\_\_  
, J.

Respectfully submitted,

  
Timothy McArthur, Pro Se

\_\_\_\_\_  
Irwin B. Schwartz BBO #548763  
Petrie Schwartz LLP  
500 Boylston Street, Suite 1860  
Boston, Massachusetts 02116  
(617) 421-1800  
(617) 421-1810 (fax)

Attorneys For Plaintiff  
FIRST, LLC

**Irwin Schwartz**

**REDACTED**

**EXHIBIT C**

**From:** McArthur, Timothy  
**Sent:** Monday, March 28, 2005 1:31 PM  
**To:** Irwin Schwartz  
**Subject:** RE: Update On Proposed Stipulated TRO In FIRST, LLC v. McArthur

Signed and Faxed at 10:28am

I will try to get this over-nighted to you, but I admit that it will be difficult for me to accomplish today. At the very least I will have it in the US mail (certified) by end of day today.

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**From:** Irwin Schwartz [mailto:ischwartz@petrieschwartz.com]  
**Sent:** Monday, March 28, 2005 9:52 AM  
**To:** McArthur, Timothy  
**Subject:** RE: Update On Proposed Stipulated TRO In FIRST, LLC v. McArthur

Tim:

I've made the changes suggested by your attorney and attached a redlined copy to show you as well as a final pdf version of the proposed stipulated TRO. Please execute the final version and fax it to me as well as send the original to me by overnight mail. I will send you back a countersigned copy for your files.

As far at the hearing on the motion for preliminary injunction, a court is required to hold a preliminary injunction hearing within 10 days following the entry of a TRO so I have to include it in there. If we settle, there will be no need for you to appear (this is what in fact happened in that Mattel case I told you about). If we are unable to reach a final settlement before that hearing, I will suggest to the judge that he allow you to appear by telephone. Of course, you can always retain counsel in Boston and he or she can appear instead of you.

Please feel free to have your lawyer call me if you or he has questions.

Thanks

Irwin Schwartz  
Petrie | Schwartz LLP  
500 Boylston Street, Suite 1860  
Boston, MA 02116  
617.421.1800 (phone)  
617.421.1810 (fax)  
ischwartz@petrieschwartz.com

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**REDACTED**

-----Original Message-----

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